United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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76-1269 B POS

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

CASE NO. 76-1269

UNITED STATES OF AMERICA,

Appellee

vs.

HERBERT SPERLING,

Appellant

Appeal from Order of United States District Court for the Southern District of New York on Reconsideration of Sentencing on Count 1 (Conspiracy)

UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

BRIEF FOR APPELLANT

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STATEMENT OF THE CASE

References to appeal record on original direct appeal, United States v. Sperling, Case No. 73-2363, 506 F. 2d 1323 (2d Cir. 1974) are designated "R.___". References to appellant's appendix in instant appeal are designated "App. _____".

Superseding Indictment 73 Cr. 441, filed May 11, 1973, charged appellant Herbert Sperling, hereinafter called Sperling, and seventeen others in twelve counts with violations of narcotics laws. Count 1 charged all defendants and six unindicted co-conspirators with conspiring to violate the Controlled Substances Act of 1970 (hereinafter called the "Act"). Count 2 charged Sperling with engaging in a continuing criminal enterprise in violation of 21 U.S.C. 848. Counts 8, 9 and 10 charged Sperling with substantive violations of Section 841 of the Act. The remaining counts related to other conspirators. Sperling was convicted on Counts 1, 2, 8, 9 and 10. He was sentenced on Counts 1, 8, 9 and 10 as a second offender to serve 30 years and pay a $50,000.00 fine on each count. On Count 2 he was sentenced to serve life without parole and pay a $100,000.00 fine. All prison sentences were concurrent. The fines were cumulative.

On October 10, 1974 this Court affirmed Sperling's convictions on Counts 1 and 2, and reversed and remanded for a new trial on Counts 8, 9, and 10. United States v. Sperling, supra. This Court also directed that in view of the reversal on Counts 8, 9 and 10 and the possible spillover effect, Sperling be re-sentenced on Count 1 (conspiracy count). Id. at 1335, note 14; and 1343. This Court's mandate issued January 30, 1975. On March 3, 1975, Sperling's petition for certiorari was denied. Sperling v. United States, 420 U.S. 962 (1975). On May 16, 1975, an order of nolle prosequi was filed in the district court dismissing Counts 8, 9, and 10.

On May 1[illegible], 19[illegible]6 Judge Pollack held a hearing pursuant to this Court's mandate to reconsider the Count 1 conspiracy sentence. Prior to the hearing Sperling filed a motion, amended motion, affidavits, and memorandum of law, contending that upon reconsideration the district court should vacate the sentence on Count 1 and re-impose no sentence at all on that count, because the conspiracy charged therein was a necessarily required element of the concerted action charged in the Count 2 enterprise; and for the additional reason that the Count 1 conspiracy was a lesser included offense and one of the series of violations charged in Count 2 as part of the continuing enterprise. Sperling contended that inasmuch as he was sentenced to serve life without parole on Count 2, the additional punishment imposed on Count 1 constituted double punishment, and double jeopardy, in violation of the Fifth Amendment. (App. 17, 34).

Alternatively, Sperling contended that under the indictment, evidence, and the Court's charge, Count 1 should be construed as prosecuted under the general conspiracy statute, 18 U.S.C. 371, and re-sentence should conform to that statute, rather than the special narcotics conspiracy statute, 21 U.S.C. 846. The maximum penalty under Section 371 is five years imprisonment and a $10,000.00 fine. (App. 17, 34-35).

Again alternatively, Sperling contended that any resentence on Count 1 pursuant to Section 846 must be limited to a maximum of two years imprisonment, as the jury could have found from the evidence and the Court's charge that he conspired only to violate 21 U.S.C. 844, which defines the offense of simple possession of narcotics, and prescribes a two year maximum penalty. (App. 18, 35).

The government filed a memorandum in opposition contending that: (1) The relief sought by Sperling is not available because Sperling did not seek it on the original direct appeal and because no constitutional issues are asserted; (2) A 21 U.S.C. 846 conspiracy and a 21 U.S.C. 848 enterprise

are separate and distinct offenses; (3) The applicable conspiracy statute is 21 U.S.C. 846 and not 18 U.S.C. 371; (4) Sperling's contention that the jury could have found that the object of the conspiracy as to him was the simple possession of cocaine is "ludicrous." (App. 78-92).

During the hearing on May 17, 1976 Judge Pollack stated that the issues raised by Sperling are no longer open because Sperling failed to raise them on the original direct appeal. Judge Pollack nevertheless proceeded to consider each issue on the merits "in recognition of the serious penalty." (App. 105, 114). Judge Pollack then ruled adversely to Sperling on each and every issue, and after obtaining a new pre-sentence report re-sentenced Sperling to the same sentence theretofore imposed on Count 1, to-wit, 30 years imprisonment, to run concurrently with the sentence of life without parole on Count 2. In addition, a $50,000.00 fine was imposed. (App. 111). Judge Pollack filed a written "Order and Judgment on Resentence" dated May 17,1976, and a separate memorandum opinion, generally adopting the government's contentions. (App. 111, 112 et seq). Additional facts will be stated under the Argument, post.

This appeal is from Judge Pollack's aforesaid "Order and Judgment on Resentence" filed May 17, 1976. (App. 123).

ARGUMENT

POINT 1

THE DISTRICT COURT HAD JURISDICTION TO GRANT THE RELIEF REQUESTED

The short answer to the government's argument that relief is not available under 28 U.S.C. 2255 is that this is not a Section 2255 proceeding but a de novo sentencing proceeding pursuant to this Court's mandate issued on the original direct appeal. Judge Pollack's compliance with this Court's mandate to reconsider sentence on Count 1 was a continuation of the original sentencing proceeding and not a post conviction proceeding, hence it is un-

necessary to resort to Section 2255, although relief under Section 2255 is no doubt available in the absence of other remedy.

The government's argument that no constitutional issues are involved is clearly erroneous as the principal issue involved is based on the double jeopardy clause of the Fifth Amendment. Sperling's alternative claim that he was sentenced under the wrong statute is a due process claim.

Finally the government argues that Sperling on his original direct appeal by-passed the issues now raised (App. 83). There was no deliberate by-pass as the issues now raised were not ripe for consideration prior to this Court's affirmance of the life sentence on Count 2. On the original direct appeal Sperling's counsel challenged the constitutionality of Section 848 and contended there was insufficient evidence to support his conviction on that count. If this Court or the Supreme Court had agreed and vacated the life sentence on Count 2, Sperling's present contention that Count 1 was subsumed in Count 2 would be moot. Furthermore Sperling's counsel on the original appeal did not consultSperling as to how to present the appeal and what questions to raise, therefore Sperling could not have deliberately by-passed issues which his counsel unilaterally determined were premature for litigation on the original appeal. Cf. Henry v. Mississippi, 379 U.S. 443, 451 (1965), holding to effect that an alleged waiver by a defendant of an issue is a factual matter to be determined only after an evidentiary hearing, to ascertain whether he knowingly participated in his counsel's decision. At any rate, as already mentioned, the instant sentencing proceeding is essentially a continuation of the original sentencing proceeding, or a de novo proceeding, by virtue of this Court's remand, and in either event Sperling was entitled to raise any issue on resentencing that he could have raised at time of original imposition of sentence.

Additionally, Judge Pollack had jurisdiction under Rule 35, Fed. Rules of Crim. Proc., which allows an illegal sentence to be corrected at any time. And it is well settled that a sentence which violates the double jeopardy clause is an illegal sentence subject to challenge at any time. United States v. Mack, 494 F. 2d 1204, 1207 (9 Cir. 1974). See, also, Prince v. United States, 352 U.S. 322 (1957). The same principal applies to Sperling's alternative contention that he was sentenced under the wrong statute, 21 U.S.C. 846, to a more severe sentence than was allowable under the correct statute, 18 U.S.C. 371.

POINT 2

THE COUNT 1 CONSPIRACY WAS A NECESSARY ELEMENT AND LESSER INCLUDED OFFENSE OF THE CONCERTED ACTION OF COUNT 2; IT WAS ALSO ONE OF THE "SERIES OF VIOLATIONS" CHARGED IN COUNT 2

Statutes: 21 U.S.C. 846 and 21 U.S.C. 848

Count 2 is drawn under 21 U.S.C. 848 which defines the offense of engaging in a continuing criminal enterprise and provides a penalty of up to life imprisonment without parole for a first offender plus a fine of $100,000.00. One element of a Sec. 848 offense is that the defendant shall commit a "series" of violations of the narcotics laws. Another element is that he shall undertake to commit such series of offenses "in concert" with five or more other persons. Sec. 848 provides, in pertinent part:

> "A person is engaged in a continuing criminal enterprise if . . . he violates any provision of this subchapter . . . the punishment for which is a felony, and . . . such violation is part of a continuing series of violations of this subchapter . . . which are undertaken by such person in concert with five or more other persons with whom such person occupies a position of organizer, a supervisory position, or any other position of management . . ."

Count 1 as amended (see App. 27, 63 et seq) purports to be drawn under 21 U.S.C. 846, which defines a narcotics conspiracy and/or an attempt to violate narcotics laws, and provides punishment as follows:

> "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment for the offense, the commission of which was the object of the conspiracy."

There are two principal reasons, among others, why a completed Sec. 848 offense necessarily includes and subsumes a Sec. 846 conspiracy.

First, one element of a Sec. 848 offense is that the defendant shall violate narcotics laws "in concert with five or more other persons." It is impossible to act in concert with others without first reaching an agreement to do so. Such agreement is the essence of a conspiracy. Such conspiracy is the sine qua non of acting in concert. This conclusion is fortified by the legislative history of Sec. 848, which shows that Congress equated acting "in concert" with "conspiring", as alternative ways of expressing the same idea. For instance, the Report of the Senate Judiciary Committee which accompanied the original Senate legislation through that Chamber defined a Sec. 848 offense, in part, as requiring a finding that the defendant "acted in concert with or conspired with at least five or more other persons. . ."

Second, Sec. 848 has other elements within its dragnet language that include "any" violation of "any" provision of the subchapter in which Sec. 848 appears. Sections 846 and 848 are in the same subchapter of the Act. One element of a completed Sec. 848 offense is that the defendant violated "any provision of this subchapter . . . the punishment for which is a felony." Another element is that such violation "is part of a continuing series of violations of this subchapter." Either of these elements could include a Sec. 846 conspiracy, and in fact did so in the instant case, as the indictment and evidence show. The above-quoted language from Sec. 848 is open-ended and all-inclusive, encompassing and subsuming any and all

felony violations of "any provision of this subchapter." Sec. 848 is an octopus with a separate tentacle for each felony violation defined in "this subchapter." Its elements embrace and include every possible felony violation of Chapter 13, Subchapters I and II, Controlled Substances Act of 1970, including, inter alia, "any" felony conspiracy defined by Section 846.

Congress did not intend, and the double jeopardy provision of the Fifth Amendment does not permit, a Sec. 846 offense to be pyramided with a Sec. 848 offense for punishment purposes.

Indictment, Evidence, and Charge to Jury

Proceeding now from the statutes to the particularities of how they were applied in the instant case, the merging of Count 1 and Count 2 for punishment purposes comes into sharper focus.

Same time spans: The time span of the Count 1 conspiracy is identical to the time span of the count 2 enterprise. Count 1 as originally drawn covered the period January 1, 1971 to May 11, 1973 (date indictment was returned). However the Court in charging the jury narrowed the Count 1 time span to conform to the precise and identical period covered by Count 2, to-wit, May 1, 1971 to May 11, 1973 (R. 4123). (The Court mistakenly told the jury that the indictment was filed April 13, 1973; actually it was filed May 11, 1973. See R. 4123, App. 1, 27). This conforming of time spans was done on the basis of the government's so-called "concession" that no pre-may 1, 1971 proof was in evidence (R. 4099). The Court also physically amended the indictment so as to make the time spans of Count 1 and Count 2 identical. (App. 27, 63 et seq).

Same conspirators: Count 2, as supplemented by bill of particulars filed July 10,1973, names nine persons who allegedly acted in concert to commit multiple violations of the narcotics laws. These nine persons were: Herbert Sperling, Peter Salanordi, Carlo Lombardi, Norman Goldstein, Joseph

Conforti, Cecile Sperling, Jack Spada, Edward Peter Schworak, [1] and Louis Mileto. These same nine persons are included in the conspirators named in Count 1. The Court in charging the jury freely intermingled most of these names as persons who "conspired" in Count 1 and who acted "in concert" in Count 2. (R. 4151, 4153).

The fact that different individuals are charged in Counts 1 and 2 is not relative or dispositive of the double jeopardy and cumulative punishment as to Herbert Sperling individually, as will be discussed and demonstrated later in this brief, post, pages 28-29.

Same objects: The object of the Count 1 conspiracy as to Herbert Sperling (as narrowed by the Court's charge and amendment of Count 1) was that Herbert Sperling and at least one other person would violate Sec. 841 of the Act. One of the objects or elements of the Count 2 enterprise was that Herbert Sperling and at least five others would act in concert to violate the identical statute, Sec. 841.

The Court's charge on Count 1: Everything the Court charged respecting Herbert Sperling's individual involvement in Count 1 was also charged, or could properly have been charged, respecting his personal involvement in Count 2. While everything the Court said about "larger" Count 2 was not necessarily applicable to "smaller" Count 1, the converse was not true, as to Sperling. There was no "Sperling" element in Count 1 that was not included in Count 2. This is evident from the entire charge, and particularly the following excerpts that are illustrative of the charge on Count 1:

> "What is a conspiracy ? It is simply a combination or agreement of two or more persons, or concerted action by two or more persons, to accomplish a criminal or unlawful purpose. There have to be at least two people involved. You can't conspire with yourself. It is, in essence, a partnership in crime." (R. 4124).

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1 / Edward Peter Schworak was originally listed as "John Doe, a/k/a 'Eddie'" in the caption of the indictment and body of Count 1. The Government on May 15, 1973, furnished his true name and wrote it on the caption of the indictment, and listed it in bill of particulars filed July 10, 1973.

> "If, for example, there was a concerted action among several persons, with each of them doing something related to the acts of the others . . . Such intention may be inferred drom the activities of the co-conspirators . . . " (R. 4126.)
>
> "The scope of each defendant's agreement must be determined individually . . ." (R. 4129).
>
> "Each is entitled to individual consideration . . . including evidence of his or her . . . status as partner, manager or supervisor . . ." (R. 4132).
>
> The fact that the parties are not always identical does not mean that there are separate conspiracies." (R. 4133-4134).

From the above charge on Count 1, the following salient points emerge: (1) Conspiracy is the equivalent of concerted action. (2) A conspirator may be either a partner, manager or supervisor in relation to the others. (3) Guilt is individual. (4) It is immaterial that the parties are not always identical.

The Court's charge on Count 2: The charge on Count 1 smoothly telescoped into the charge on Count 2, as to Herbert Sperling. The Court said:

> "I will now turn to the substantive counts in the indictment and I will refer first to Count Two. . . Before you can find the defendant Herbert Sperling guilty of the crime charged in the 2nd count of the indictment you must be convinced beyond a reasonable doubt . . . that the defendant Herbert Sperling committed . . . a continuing series of violations . . . in concert with five or more other persons . . " (R. 4139-4140).

The Court's Marshalling of the Evidence Cemented the Merger of Counts One and Two as to Herbert Sperling

In marshalling the evidence on Counts 1 and 2 as to Sperling the Court told the jury:

> "I will now deal with the evidence produced by the government which it contends points to the guilt of each defendant . . ." (R. 4150)
>
> "First in summary. The government contends (as to Count 1) that the evidence shows a single conspiracy among all the defendants to purchase, to

> process and resell narcotic drugs . . . The government contends that Sperling commanded the services of Norman Goldstein, Edward Schworak, Louis Mileto, Cecile Sperling, Jack Spada and Joseph Conforti." (R. 4151). (The Court is speaking here of Count 1).
>
> "Now as to Count Two, which is against Herbert Sperling . . . The government contends that Sperling occupied a position of organizer, supervisor and manager with respect to six persons in connection with his narcotics business, Edward Schworak, Jack Spada, Norman Goldstein, also known as Sonny Gold, Joseph Conforti, Louis Mileto and Cecile Sperling. The government contends that Schworak, Spada, Goldstein, Conforti and Mileto stored heroin or mix and at Sperling's direction would dilute narcotics and deliver them." (R. 4153).

Thus the Court told the jury that, as to Count 1, Sperling commanded the services of six particular persons, and that, as to Count 2, he occupied a position of organizer, supervisor and manager of the same six persons. This effectively cemented the merger of Counts 1 and 2, as to Sperling, for punishment purposes upon conviction.

The Applicable Law

This is a double jeopardy case involving the issue of multiple punishment, as contrasted to prosecution or conviction. It is not a Wharton's Rule case.

Assuming arguendo that Wharton's Rule countenances prosecution of related Sec. 846 and 848 violations at the same trial, Sperling contends that under the particular facts of the instant case, including the evidence and the Court's charge to the jury, the double jeopardy clause of the Fifth Amendment prohibits cumulative punishment for a Sec. 846 conspiracy and a related Sec. 848 enterprise.

A person may be punished for only one of a series of included offenses, even though he may have been convicted of all the offenses at the same trial. Blockburger v. United States, 284 U.S. 299 (1932). See also Gavieres v. United States, 220 U.S. 338 (1911). Under the Blockburger

double jeopardy test, offenses are the same and may not be punished cumulatively unless each offense requires proof of a fact that the other does not. In the instant case the Count 1 conspiracy, as to Sperling, did not require proof of any fact not required to prove the Count 2 enterprise. Gavieres and Blockburger are still viable. Waller v. Florida, 397 U.S. 387, 390; Robinson v. Neil, 409 U.S. 505; Robinson v. Neil, 366 F. Supp. 924, 929 (E.D.Tenn. 1973).

The Count 1 conspiracy is not only a necessary element of the Count 2 concerted action but in a different and larger sense the Count 1 violation is one of the continuing series of violations charged in Count 2. Sec. 848 specifically prohibits a "continuing criminal enterprise." Count 2 of the indictment tracks the language of Sec. 848 in charging Sperling with engaging in a "continuing" enterprise during a time span identical to the Count 1 time span.

When a continuing course of conduct is prohibited by statute the separate acts constituting the course of conduct may not be punished cumulatively. United States v. Jones, 553 F. 2d 1387 (6th Cir. 1976). "To hold that proof of a different act under a separate count establishes a separate offense would destroy the principle that a course of conduct is punishable as only one offense." Id. at 1392. The English case of Crepps v. Durden, Cowper 640 (K.B. 1777), illustrates the principle that acts constituting a course of conduct are not punishable separately if the Legislature intends to punish the course of conduct. There, a baker made and sold loaves of bread on Sunday in violation of a statute prohibiting the practice of one's trade on the Sabbath. He suffered four convictions, but Lord Mansfield's opinion set aside three of them, holding that regardless of how many loaves of bread he baked or how many he sold or how many hours he worked, only one offense could occur during the time span of any given Sunday. This principle was applied to bar separate punishment for an act of adultery where

punishment had already been imposed for the "continuing" offense of cohabitation. Ex parte Nielson, 131 U.S. 176 (1889).

Congressional Intent

Neither Congress nor the Courts can constitutionally violate the double jeopardy clause of the Fifth Amendment as to punishment, hence any purpose or intent of Congress to do so may not legally be given effect by the Courts.

At any rate there is absolutely nothing in the Controlled Substances Act of 1970 or its legislative history indicating congressional intent to cumulate punishment for related Sec. 846 and 848 violations. Congress first included continuing criminal enterprise in the Act not as an independent crime but as a sentencing alternative, the purpose and intent being to severely punish criminals who make a substantial living by violating the Act. For procedural and constitutional reasons the original proposal was changed to create an independent crime but the purpose remained the same, i.e., to enhance punishment for large scale offenders.[2/] This purpose was accomplished by the extremely severe penalty clause of Sec. 848, providing punishment of up to life without parole for a first offender. This being the ultimate, the ultimate solution (short of capital punishment), what possible purpose could Congress have for intending additional punishment upon conviction of a lesser included offense ? Congress should not be presumed to intend a vain and useless thing, such as kicking a dead horse to death.

The Supreme Court has held that the rule of lenity applies where neither the wording of an Act nor its legislative history clearly indicates that overlapping sections are intended to be punished cumulatively.

2/ See additional views appended to H.R.Rep. No. 1444, 91st Cong., 2nd Sess. (1970) (to accompany H.R. 18583), 1970 U.S.Code Cong. and Admin. News, pp. 4566, 4649-4651.

Construing the Bank Robbery Act,for instance, the Supreme Court held that entry with intent to rob may not be punished cumulatively with the consummated robbery and putting a life in jeopardy. Prince v. United States , 352 U.S. 322. Comparable holdings are found in Heflin v. United States, 358 U.S. 415, 419-420 (1959); Milanovich v. United States, 365 U.S. 561 (1961); and Ladner v. United States, 358 U.S. 169 (1958). The statutes involved in the instant case, being in the same Act and subchapter of a single enactment, are analagous to the Bank Robbery Act.

The government may attempt to go outside the 1970 Act for an indication that Congress previously intended a rule of harshness, rather than lenity, to apply to former, separately enacted, narcotics statutes. Such intention may well be found, or presumed, in former separately enacted narcotics statutes that seemed to overlap. The leading case on the rule of harshness for narcotics offenders under former laws (now repealed) is Gore v. United States, 357 U.S. 386 (1958), where the Supreme Court held that on the basis of one sale of narcotics it was permissible to convict the defendant and cumulatively punish him for (1) the sale of drugs not in pursuance of a written order; (2) the sale of drugs not in the original stamped package; and (3) sale of the same drugs with knowledge they had been unlawfully imported. Gore is easily distinguished from the instant case. In Gore, Justice Frankfurter pointed out that "The three penal laws for which petitioner was convicted have different origins both in time and design . . . three different enactments, each relating to a separate way of closing in on illicit distribution of narcotics, passed at three different periods. . ." Each of the three statutes in Gore required a distinct element not present in the other two, and this meets the Blockburger double jeopardy test. By contrast, Sections 846 and 848 in the instant case were included in a single enactment, in the same subchapter, and there

is no element in a Sec. 846 conspiracy that is not included in the larger Sec. 848 "series" of offenses which require concerted action. None of the three Gore statutes provided the ultimate penalty of life without parole as does Sec. 848; indeed, all of the relatively mild penalties of the Gore statutes, added together, are less severe than the Sec. 848 penalty of life without parole.

It is conceded that Congress has been, and still is, harsh on narcotics offenders; however Congressional harshness is built into the four corners of Sec. 848, hence need not be presumed as between overlapping sections of the same subchapter. All felony violations of the subchapter in which Sec. 848 appears are subsumed in its continuing enterprise involving concerted action. Congress was aware of this, and made the punishment fit the crime.

Resort to former narcotics statutes to determine congressional intent respecting the 1970 Act is particularly inappropriate in view of the following statement relative to the 1970 Act in U.S.Code Cong. and Admin. News, 91st Cong., Vol. 3, p. 4570: "Criminal Penalties. -- The bill revises the entire structure of criminal penalties involving controlled drugs by providing a consistent method of treatment of all persons accused of violations."

Congressional intent, then, may be discerned only from the face of the 1970 Act itself, and its own legislative history. In this connection, the wording of Sec. 846 of the 1970 Act affirmatively indicates that Congress did not intend to cumulatively punish violations of Sections 846 and 848. Sec. 846 defines the offense of attempting or conspiring to commit a violation of the Act. Whoever "attempts" is equated with whoever "conspires." It is hornbook law that an "attempt" merges with the completed offense for punishment purposes. Separate punishment is never permitted

for an attempt and the completed act. Since "attempting" and "conspiring" are equated, and specified as alternative ways of violating Sec. 846, it would be anomalous to impute to Congress an intent to punish cumulatively for one of the alternative ways of violating Sec. 846, but not the other.

The rule of lenity is not a casual presumption about legislative intent, but a constitutionally compelled canon of construction which requires Congress to specify clearly when overlapping subsections of the same enactment are to be punished cumulatively. It forbids courts to proliferate sentences out of legislative silence. It is designed to preclude substantive double jeopardy. Applying the rule of lenity in Ladner v. United States, supra, 358 U.S. 169, the Court, quoting from United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221-222 (1952), said:

"When choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication."

Wharton's Rule, Ianelli v. United States, and United States v. Jeffers, are Inapplicable

In the instant case government counsel in the court below relied on Ianelli v. United States, 420 U.S. 770, 785, n. 17 (1975), and inferentially on Wharton's Rule, in arguing that Section 846 and 848 offenses are punishable separately. (App. 87-89). The Seventh Circuit recently argued likewise in holding that, although a Sec. 846 conspiracy is unquestionably a lesser included offense of a Sec. 848 enterprise, a person nevertheless may be convicted on each charge, and the sentences may be pyramided. United States v. Jeffers, 535 F. 2d 1101 (7th Cir. 1976), cert. applied for sub nom Jeffers v. United States, petition filed 6-12-76, Case No.

75-1805, 19 CrL 4104. Jeffers is not only distinguishable on its facts as will be shown hereinafter but also suffers from a hiatus in its rationale as it attempts to bridge the gap separating Wharton's Rule from the double jeopardy clause of the Fifth Amendment respecting punishment.

But before proceeding further with criticism and distinguishing of Jeffers it seems appropriate to examine and distinguish the Supreme Court's decision in Ianelli, a Wharton's Rule case, relied on by the Jeffers court, where eight defendants were convicted of running an illegal gambling business and of con spiring to do so, in violation of Sections 1955 and 371/of Title 18, U.S. Code. respectively The petitioners challenged their convictions and sentences claiming that the conspiracy merged with the substantive offense under Wharton's Rule. The Supreme Court disagreed and upheld the convictions and sentences, relying on a discernible congressional intent to retain each offense as an independent curb available for use in the strategy against organized crime, 43 L. Ed. 2d at 630, citing Gore v. United States, supra, 357 U.S. 386.

The Ianelli majority decision was based wholly on Wharton's Rule and legislative intent. Ianelli was not a double jeopardy case. During oral argument Mr. Justice Brennan inquired whether Ianelli's counsel was asking the Court to find a constitutional basis for the Rule, or merely wished the Court to command the Rule's application as an exercise of its supervisory power. Ianelli's counsel replied that he did not contend the Rule had a constitutional source. 16 CrL 4129. Mr. Justice Rehnquist asked whether Wharton himself thought his Rule was based on the double jeopardy clause. Government counsel answered "No" and expressed the opinion that Wharton's Precept was "based on a misreading of a Pennsylvania case." 16 CrL at 4130. The Ianelli majority opinion categorically states that "Wharton's Rule does not rest on principles of double jeopardy." 43 L. Ed. 2d at 625.

Although the Ianelli majority rested its decision on Wharton's Rule rather than double jeopardy considerations, it did observe in footnote 17 of its opinion that the Blockburger double jeopardy test "would be satisfied in this case," reaching this conclusion by construing Sections 371 and 1955 as each requiring proof of a fact that the other does not, and specifically holding that agreement, which is the essence of the crime of conspiracy, is an element "not contained in the statutory definition of the Section 1955 offense." The Ianelli court in footnote 17 went on to reaffirm the validity of the Blockburger double jeopardy test, noting that "Blockburger requires that courts examine the offenses to ascertain 'whether each provision requires proof of a fact that the other does not.'"

There is no workable analogy between the Wharton's Rule issue relative to the Ianelli statutes, Sections 371 and 1955, and the double jeopardy punishment issue relative to Sections 846 and 848 in the instant case. In Ianelli the object of the 371 conspiracy was to committ the 1955 substantive offense, whereas in the instant case the object of the 846 conspiracy was not to commit the 848 conglomerate offense per se but rather to violate 21 U.S.C. 841. The 848 enterprise projected its own built-in conspiracy (concerted action) to violate the same statute, 21 U.S.C. 841. Thus Sections 846 and 848 project parallel conspiracies having the same objects, rather than the violation of the latter being the object of the former.

The Ianelli statutes, Sections 371 and 1955, were separate enactments at different times, hence may be construed under the Rule of Gore, supra, which was cited by the Supreme Court in discerning Congressional intent to cumulate convictions and sentences, 43 L.Ed. 2d at 630. By contrast, Sections 846 and 848 are subsections of a single enactment as aforesaid and not subject to the Gore rationale.

Further distinguishing the Ianelli statutes, Sec 1955 has no dragnet clause comparable to the language of Sec. 848 which makes "any" violation of the subchapter in which Sec. 848 appears, including a Sec. 846 conspiracy, an element, lesser included offense, and one of the series of violations of a Sec. 848 conglomerate enterprise.

The Ianelli decision, footnote 18, recognizes the fact that the dual punishment issue presented by a greater and lesser included offense is not disposed of or even considered in its Wharton's Rule approach to the Ianelli statutes. The Court also said that where a substantive offense requires collective criminal activity and therefore presents some of the same threats that the law of conspiracy normally is thought to guard against, "it cannot automatically be assumed that the legislature intended the conspiracy and the substantive offense to remain as discrete crimes upon consummation of the latter," and that in the absence of legislative intent to the contrary, Wharton's Rule supports a presumption that the two merge when the substantive offense is proven. 43 L. Ed. 2d at pp. 627-628. The foregoing observation by the Court seems tailor-made for the statutes involved in the instant case, and could well support an argument that Wharton's Rule compels a presumption of merger, at least for punishment purposes, upon conviction of related 846 and 848 offenses at the same trial.

Returning now to the Jeffers case, 532 F. 2d 1101, which the government will no doubt rely on, the sweep of the Seventh Circuit's opinion is much broader than necessary to decide the narrow issue there presented, hence much of what is said is mere dictum. Two indictments were handed down against Garland Jeffers the same day, the first charging Jeffers and nine others with conspiring to violate narcotics laws in violation of 21 U.S.C. 846, the second charging Jeffers with engaging in a continuing criminal enterprise in concert with five or more other persons in violation of

21 U.S.C. 848. The two indictments covered identical time periods and the evidence showed without question that the 846 conspiracy was a lesser included offense of the 848 enterprise. The government attempted to consolidate the two indictments for trial but Jeffers "objected strenuously" whereupon the trial judge ruled, at Jeffers' insistence, that the trials could not be joined. 532 F. 2d at 1106. Jeffers was tried first on the conspiracy charge, convicted, and sentenced to serve 15 years. He was then tried on the Section 848 charge, convicted, and sentenced to life imprisonment, to be served consecutively with the 15 year conspiracy sentence. Id. at 1105. On appeal Jeffers contended that his Section 848 conviction and sentence were barred on double jeopardy grounds by the prior conspiracy conviction and sentence. Id. at 1104. The Seventh Circuit disagreed and held that the prior conviction and sentence on the first indictment did not prevent prosecution and imposition of a consecutive sentence on the second indictment. Id. at 1111.

The Jeffers court in Part B of its decision, Id. at 1106-1108, correctly demonstrates, and specifically holds, that conspiracy to distribute narcotics in violation of Sec. 846 falls within the definition of a lesser included offense of a related Section 848 enterprise, citing Gavieres v. United States, supra, and Blockburger v. United States, supra, and correctly holding in footnote 3 of its opinion that the Gavieres and Blockburger rules "appear to be underlying assumptions of present thinking on the double jeopardy issue," citing Waller v. Florida, supra, 397 U.S. 387, 390; Robinson v. Neil, supra, 409 U.S. 505; and Robinson v. Neil, supra, 366 F. Supp. 924, 929 (E.D. Tenn. 1973).

All that and the doctrine of stare decisis to the contrary notwithstanding, the Jeffers court in Part C of its opinion, 532 F. 2d at 1108-1111, abruptly reverses direction, erroneously equates the Blockburger test of double jeopardy with Wharton's Rule of legislative intent, then misconstrues

and misapplies dictum from footnote 17 of Ianelli v. United States, supra, 420 U.S. 770, 785, 43 L. Ed 2d 616, 627, to arrive at the patently erroneous conclusion that since the Ianelli court construed Wharton's Rule as "essentially an aid to the determination of legislative intent," the Blockburger test is likewise a mere "tool for statutory interpretation rather than a double jeopardy decision." 532 F. 2d at 1109. The hiatus in the Jeffers rationale occurs at this point, where an attempt is made to diminish the double jeopardy clause of the Fifth Amendment from a constitutional imperative to a mere tool for statutory interpretation.

The Jeffers court misapplies Ianelli by mistakenly assuming that the Ianelli petitioners relied not only on Wharton's Rule but also the Fifth Amendment guarantee against double jeopardy. 532 F. 2d at 1108. Actually, the Ianelli petitioners relied exclusively on Wharton's Rule, did not claim a constitutional basis for the Rule, and the Supreme Court decided the case wholly on Wharton's Rule considerations rather than double jeopardy contentions, as shown ante, page 16. The Supreme Court's majority decision in Ianelli does not address the double jeopardy issue but deftly sidesteps it, which is understandable in view of the petitioners' categorical disclaimer of reliance on it.

The Jeffers Court's sole basis or argument for equating Wharton's Rule of legislative intent with the Blockburger test of double jeopardy is found in footnote 17 of Ianelli, [3/] which commences with the gratuitous

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3/ Footnote 17, 43 L. Ed 2d at 627, is as follows:
"The test articulated in Blockburger v. United States, 284 US 299 . . . serves a generally similar function of identifying congressional intent to impose separate sanctions for multiple offenses arising in the course of a single act or transaction. In determining whether separate punishment might be imposed, Blockburger requires that courts examine the offenses to ascertain 'whether each provision requires proof of a fact that the other does not.' As Blockburger and other decisions applying its principle reveal, see, e.g., Gore v. United States . . . American Tobacco Co. v. United

(This footnote concluded on page 21, post)

and somewhat ambiguous dictum that the Blockburger test serves a function "generally similar" to Wharton's Rule in identifying congressional intent to impose sanctions for multiple offenses arising in the course of a single transaction. The Jeffers court misconstrues this dictum, lifted out of context from the rest of footnote 17, as authority for its own erroneous conclusion that the "focus" of the Blockburger test has now been "shifted by the characterization given it in the Ianelli opinion" so that "it now appears to center on the congressional intent." 532 F. 2d at 1101. The Jeffers court thus reads into Ianelli footnote 17 something that simply is not there. Footnote 17 says nothing at all about changing the focus of the

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3/ Continued from preceding page:

States, 328 US 781, 788-789 (1946), the Court's application of the test focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes. See Gore v. United States, supra. We think that the Blockburger test would be satisfied in this case. The essence of the crime of conspiracy is agreement, see, e.g., Pereira v. United States, 347 US 1, 11-2; Braverman v. United States, 317 US 49, 53 (1942); Morrison v. California, 291 US 82, 92-93 (1934), an element not contained in the statutory definition of the Section 1955 offense. In a similar fashion, proof of violation of Section 1955 requires establishment of a fact not required for conviction for conspiracy to violate that statute. To establish violation of Section 1955 the prosecution must prove that the defendants actually did 'conduct, finance, manage, supervise, direct, or own all or part of an illegal gambling business.' 18 USC 1955(a). The overt act requirement in the conspiracy statute can be satisfied much more easily. Indeed, the act can be innocent in nature, provided it furthers the purpose of the conspiracy. See Yates v. United States, 354 US 298, 333-334 (1957); Braverman, supra." (End of Ianelli footnote 17, 43 L.Ed.2d at 627).

(Emphasis added)

Blockburger test but rather recites and reaffirms the validity of that test, "whether each provision requires proof of a fact that the other does not," and concludes that the Blockburger test "would be satisfied in this case." Then, in reconciling its Ianelli holding with the Blockburger double jeopardy test, the Supreme Court in Ianelli footnote 17 carefully avoids overruling or changing the focus of Blockburger but rather construes each statute involved in Ianelli, Sections 371 and 1955, as requiring proof of a fact that the other does not, and specifically holds that a Section 371 conspiracy is an element "not contained in the statutory definition of the Section 1955 offense." Thus the Supreme Court, rather than bending the Blockburger or changing its "focus" (a word first used by the Seventh Circuit), actually bends and changes the focus of the statutes involved in Ianelli, so that each statute as thus judicially construed and interpreted requires "proof of a fact that the other does not."

Stated another way, the Jeffers court erroneously construes Ianelli footnote 17 as weakening the Blockburger test to conform it tothe Ianelli Wharton's Rule holding, whereas the Supreme Court did the conforming in the opposite direction, reaffirming the validity of the traditional Blockburger double jeopardy test, but construing, indeed bending, the relevant Ianeilli statutes as aforesaid so they would conform to that test, rather than the vice versa.

It is thus seen that while the Jeffers court necessarily relies on the Supreme Court's reconciling of Ianelli and Blockburger, it rejects out of hand the basis, direction and rationale by which the Supreme Court did its reconciling, and categorically insists (in direct contradiction of the Supreme Court's explicit holding) that a Section 371 conspiracy is a lesser included offense of a Sec. 1955 violation. 532 F. 2d at 1109.

The Jeffers court then proceeds in footnote 6 of its own opinion, Id. at 1109,[4/] to argue that the Supreme Court majority did not mean what it plainly said in Ianelli footnote 17 as to a Sec. 371 conspiracy not being included in a Sec. 1955 violation. The Jeffers court, arguing two ways at the same time, cites Justice Douglas' dissent in Ianelli to demonstrate the majority's supposed mistake in holding that conspiracy is not an element of a Sec.1955 offense. The Jeffers court has labored mightily to change the nature and "focus" of the Blockburger test with nothing to go on but the ambiguous opening dictum of Ianelli footnote 17, then gives this dictum a meaning exactly opposite to what the majority said in the rest of footnote 17, and cites the Ianelli dissent to prove its point. This type of pick and choose rationale will not pass muster in the light of logic and common sense.

4/ Footnote 6 of the Jeffers opinion, 532 F. 2d at 1109, is as follows: "The Court in Ianelli tries to make an argument that Sec. 1955 and conspiracy to violate Sec. 1955 require different elements for conviction for each offense. Certainly, as the Court points out, 420 U.S. at 785 n. 17, the statutory definition of the Sec. 1955 offense does not explicitly contain the required element of agreement. However, it is difficult to imagine how one can prove that five or more people managed a gambling business without also having proved that they operated under an agreement to do just that. As Justice Douglas wrote in his dissent to Ianelli: 'The evidence established, in the Government's view, "syndicated gambling," the kind of activity proscribed by Sec. 1955. The very same evidence was relied upon to establish the conspiracy -- a conspiracy, apparently, enduring as long as the substantive offense continued, and provable by the same acts that established the violation of Sec. 1955. Thus the very same transactions among the defendants gave rise to criminal liability under both statutes.' 420 U.S. at 792. The Court itself even recognizes that there is a 'concerted activity' requirement in Sec. 1955, but says the only purpose of this element was to limit federal prosecutions to large scale gambling activities. Id., at 790. Similarly, the Court seems to agree with Justice Douglas' conclusion that the same evidence which proves a Sec. 1955 violation can also prove a conspiracy violation when it notes that prosecutors should not always seek conviction under both Sec. 1955 and the conspiracy statute, but should use their discretion in prosecuting under one statute or another. Id., at 791."

(End of Jeffers footnote 6, 532 F. 2d at 1109)

The Jeffers court, after relying on Justice Douglas' "same transaction" theory of double jeopardy in footnote six of its opinion, supra, 532 F. 2d at 1109, does another turnabout in footnote 12 of its opinion, Id. at 1111, and is comforted because the Ianelli majority supposedly refuses to accept this theory. Thus the Jeffers court comes full circle and meets itself going both ways, utilizing the ploy of ambiguous and inconsistent footnotes to march in two directions at the same time.

It is immaterial, for purpose of criticizing the Jeffers court's reliance on Ianelli, whether the Ianelli majority opinion, Footnote 17, was right or wrong in holding that conspiracy is not an element of a Sec. 1955 offense. The Jeffers court cannot logically rely on the Ianelli result without accepting its rationale.

The Jeffers court attempts to extend the concept of Wharton's Rule of legislative intent beyond the facts and rationale of Ianelli, which was a very close case to begin with. The result overextends the holding of Ianelli beyond its perimeter and severely undercuts the double jeopardy protection afforded by the FifthAmendment as fashioned by the Gavieres-Blockburger line of cases and their progeny.

Jeffers is Factually Distinguishable

Garland Jeffers is at least partially to blame for his predicament, as he insisted on separate trials and was tried on the lesser included offense first. The Seventh Circuit could have justified Jeffers' second trial, conviction and sentence on the narrow ground that Jeffers should not be permitted to maneuver himself into a trial on the lesser offense first and by that strategem forever avoid punishment for the greater. By contrast, appellant Sperling was convicted at a single trial on both the greater and lesser offenses. If Jeffers had prevailed, he would have gotten off with a fifteen year sentence. If Sperling prevails he will still be saddled

with a sentence of life without parole.

Assuming arguendo that Jeffers legally could and should have been tried for engaging in a Sec. 848 enterprise following conviction and sentencing on the 846 conspiracy, it was nevertheless impermissible to pyramid his sentences. Prince v. United States, supra. This type of sentencing problem is analagous to one that was discussed and a solution suggested in The Yale Law Journal, Comment: "Twice in Jeopardy", (1965) Vol. 75:262, at page 291, note 132:

> "A comparable problem arises where the defendant has been tried for an offense such as assault, but subsequent events alter the nature of the offense, i.e., the victim dies of injuries inflicted during the assault. A subsequent trial for manslaughter should not be permitted unless the trial for assault resulted in a conviction. If the defendant is then convicted of manslaughter the unserved segment of his sentence for assault should be credited toward his sentence for manslaughter."

Sperling assumes arguendo that neither Wharton's Rule nor the double jeopardy clause of the Fifth Amendment prohibits prosecution at the same or separate trials for related violations of Sec. 846 and 848. He contends only that the double jeopardy clause prohibits cumulative punishment where the Sec. 846 conspiracy is shown by the indictment, evidence and charge to the jury to be a necessary element and lesser included offense of the Sec. 848 enterprise, as in the instant case. Judge Pollack could and should have instructed Sperling's jury to consider the Sec. 848 count first, and not to return a verdict on the conspiracy count if they found Sperling guilty of the larger Sec. 848 violation. Wright v. United States, 519 F. 2d 13 (6th Cir. 1975). See also United States v. Maxey, 498 F. 2d 474, 475 (2nd Cir. 1974) where this Court noted with approval, in a similar situation regarding a bank robbery prosecution:

> "The jury found Maxey guilty of armed bank robbery in violation of 18 U.S.C. 2113(d) and of conspiracy. It thus became unnecessary to pass upon a lesser charge (18 U.S.C. Sec. 2113(a)) in a separate count of the indictment, in accordance with the instructions of the trial judge."

Not having done that, the proper remedy at this point is to vacate the conspiracy conviction and sentence, under rationale of Wright and Maxey, supra, and Prince v. United States, supra, which was recently cited with approval by the Supreme Court in a comparable case involving impermissibly pyramided sentences in a bank robbery case, United States v. Gaddis, 47 L. Ed 2d 222, decided March 3, 1976.

The Double Jeopardy Issue Respecting Cumulative Sentences for Related Violations of Sec. 846 and 848 Is an Open Question in this Circuit

Aside from the Seventh Circuit's Jeffers decision, supra, which is patently erroneous, distinguishable on its facts, and unnecessarily broad in its sweep, no appellate court has specifically passed on the double jeopardy issue as to whether cumulative sentences may be imposed for related violations of Sections 846 and 848.

Judge Pollack and government counsel in the court below cited four Second Circuit cases which seem at first blush to say that Section 846 and 848 violations may be cumulatively punished; however, it is clear upon closer examination that the double jeopardy issue was either not raised, or the case was disposed of on other grounds, in each of the cases cited:

In United States v. Manfredi, 488 F. 2d 588 (2d Cir. 1973), cert. denied 417 U.S. 936 (1974), co-appellant LaCosa received a sentence of 30 years plus a fine for violation of Sec. 848, and 15 years for violation of Sec. 846. Id. at 591, note 2. The only issues LaCosa raised on appeal were sufficiency of the evidence, reception of wiretap evidence, and whether Sec. 848 was void for vagueness. This Court did not address the double jeopardy issue, as it was not raised.

In United States v. Sisca, 503 F. 2d 1337 (2d Cir.), cert. denied 419 U.S. 1008 (1974), co-appellant Abraham received a life sentence for violation of

Sec. 848 and 15 years for violation of 846. The only issues raised on appeal were sufficiency of evidence, and whether Sec. 848 was void for vagueness.

In United States v. Sperling, 506 F. 2d 1323 (2d Cir. 1974), cert. denied 420 U.S. 962 (1975), Sperling received a life sentence plus a fine for violation of Sec. 848 and 30 years plus a fine for violation of Sec. 846. The double jeopardy issue was not raised on the original direct appeal, and is now being raised in this Court for the first time.

In United States v. Papa, No. 75-1208 (2d Cir., April 2, 1976), Papa received a sentence for violation of Sec. 846 in the Southern District, On appeal Papa contended that the Southern District conspiracy constituted a necessary element of a Sec. 848 offense in the Eastern District which theretofore had been dismissed pursuant to a plea bargain, hence, Papa argued, prior jeopardy barred the Southern District conspiracy prosecution. This Court held that: "To the extent appellant's Section 848 claim is predicated upon equating the conspiracies charged in the Southern and Eastern indictments, our finding that the conspiracies were entirely independent violations of 21 U.S.C. 846 is dispositive." Slip Opinion at 2991-2992. This Court then went on to state, obiter dicta, that this Court had "recognized" in the Manfredi, Sisca, and Sperling cases, supra, that prosecution under Sec. 848 is distinct and separate from a prosecution for the conspiracy and substantive offenses that may constitute some of the evidence offered on a Sec. 848 count. Id., slip opinion at 2992. This gratuitous dictum was not only unnecessary to a disposition of Papa's contentions, but also was based on mere awarness of the existence of cumulative sentences in cases where the double jeopardy issue was neither raised, considered, or decided. It therefore appears that the double jeopardy issue as to cumulative punishment for related Sec. 846 and 848 offenses has never been squarely presented to, or decided by, this Court heretofore. It is also clear that the Supreme Court has not had occasion to pass on the issue here raised.

Re: The "Third Party Exception" to Wharton's Rule

The fact that the 846 conspiracy involved more persons than the 848 enterprise required does not affect the double punishment as to Sperling as an individual defendant. Judge Pollack erroneously held in his memorandum opinion that the 846 conspiracy was not a lesser included offense within the 848 enterprise (contrary to the Seventh Circuit's holding in Jeffers, supra), and Judge Pollack's rationale for this holding was that the 846 conspiracy involved "a larger number of participants" than the 848 enterprise required (App. 114-115). Judge Pollack made a similar ruling in disposing of a pre-trial motion by Sperling's counsel to dismiss the indictment on ground it violated Wharton's Rule. See Sperling's Appendix on the original direct appeal, pp. 45, 49, Case No. 73-2363.

Judge Pollack, like the Jeffers court, has confused Wharton's Rule with the constitutional issue of double punishment. Assuming arguendo that Wharton's Rule did not require dismissal of the indictment, the double jeopardy clause of the Fifth Amendment nevertheless prohibits cumulative punishment for the two offenses. The issue here concerns Sperling alone, and his guilt as an individual. It is immaterial in this context whether one or one thousand other persons were charged in Count 1, as Sperling was guilty under that count if he conspired with any one of them. This is particularly true in view of Judge Pollack's charge to the jury that the scope of each defendant's agreement must be determined individually (R. 4129); each defendant is entitled to individual consideration, including evidence of his status of partner or supervisor (R. 4132); and it is immaterial that the parties are not always the same (R.4133-4134). Sperling's unlawful agreement was single and the same, regardless of the coming and going, or the number, of other conspirators. Indeed, during a pre-trial hearing Judge Pollack recognized this fact when he

indicated that the adding of two conspirators to Count 1 would not affect Sperling individually, one way or the other (R. 17).

The question here is not whether Congress intended to reach lower echelon conspirators, or a greater number of conspirators, in a Sec. 846 conspiracy as compared to the number that could be reached in an 848 enterprise. The individual guilt or punishment of the other 846 conspirators does not affect the double punishment issue as to Sperling in his own individual capacity. It is immaterial that different groups were "charged" in Counts 1 and 2, in view of Judge Pollack's statement to the jury that as to Sperling, the government relied on the same six co-conspirators for convictions on both Count 1 and Count 2. (R. 4141, 4153).

In holding that the Count 1 conspiracy and the Count 2 enterprise are not coterminous as to the respective groups involved, and in denying relief to Sperling on that ground, Judge Pollack misconstrued and misapplied this Court's decision in United States v. Bommarito, 524 F. 2d 140 (2d Cir. 1975), where this Court held that Wharton's Rule did not bar separate convictions for violating Sec. 841 of the Act and for conspiring to do so. (App. 114-115). This Court's holding was predicated on the so-called "third party exception" to Wharton's Rule. This Court did not address the double jeopardy issue of cumulative punishment, as contrasted to the Wharton's Rule issue of cumulative convictions.

Bommarito is distinguishable for the additional reason that the substantive statute involved there was Sec. 841 of the Act, rather than 848. Sec. 841 prohibits distributing, or possessing with intent to distribute, narcotics; which offense, as this Court pointed out, "patently requires only one person for its commission." Id. at 145. This Court in Bommarito relied on the rationale of Ianelli v. United States, supra, which as heretofore demonstrated was a Wharton's Rule case and did not address the issue of cumulative punishment.

At any rate, the proposition that a Sec. 846 conspiracy is a lesser included offense of a Sec. 848 enterprise does not turn exclusively on whether the personnel and the concerted action of the two offenses are coterminous, or whether the fact they are not coterminous (if indeed they are not) is significant or controlling. Aside from the issue of concerted action per se, a Sec. 846 conspiracy is an element and lesser included offense of a related 848 enterprise for the additional reason that the dragnet language of Sec. 848, as has already been demonstrated, includes and subsumes every possible felony violation of the subchapter in which both Sec. 846 and 848 appear. Therefore the Count 1 conspiracy was a lesser included offense of the Count 2 enterprise simply because it was a felony violation of the same subchapter in which Sec. 848 appears, and not necessarily because because both counts involved concerted action.

Even the Jeffers court recognized and specifically held that a Sec. 846 conspiracy was a lesser included offense of a related 848 enterprise, 532 F. 2d at 1106-1108, as it was obliged to do in view of the fact that Jeffers' trial judge had correctly charged Jeffers' jury at the Sec. 848 enterprise trial, as follows:

> "Count's Instruction No. 31. The violation which the Government must prove as the first element of its case against the defendant, as an alternative to a violation of 21 U.S.C. 841(a)(1), may be a violation of Title 21 of the United States Code, Section 846 . . ."

(The foregoing instruction appears at page 96 of the government's appendix in the Jeffers case, No. 75-1422, Seventh Circuit).

Judge Pollack also misconstrued and misapplied and relied on this Court's decision in United States v. Becker, 461 F. 2d 230, 234 (2d Cir. 1972) which was another Wharton's Rule case. Like Ianelli, supra, Becker involved a Sec. 371 conspiracy and a Sec. 1955 gambling offense. Becker is not applicable to the instant case for the same reasons Bommarito and Ianelli are inapplicable, being a Wharton's Rule case rather than double jeopardy.

POINT B

COUNT ONE MUST BE CONSTRUED AS DRAWN UNDER THE GENERAL CONSPIRACY STATUTE (18 U.S.C. 371) WITH FIVE YEAR MAXIMUM PENALTY

Assuming arguendo that Count 1 did not merge with Count 2, then Count 1, to be valid, must be construed as charging a single conspiracy under the general conspiracy statute (18 U.S.C. 371), as this is the only applicable conspiracy statute that was in effect throughout the entire time span of the conspiracy as initially charged in Count 1, from January 1, 1971 to May 11, 1973. The maximum penalty that may be imposed under 18 U.S.C. 371 is five years imprisonment and a $10,000.00. If Count 1 is not so construed, then it was fatally defective for duplicity (as will be shown more fully hereinafter), as being bifurcated into two time segments, and charging two separate conspiracies, under two mutually exclusive narcotics conspiracy statutes, both of which were cited in Count 1, as initially drawn, to-wit, 26 U.S.C. 7237(b) and 21 U.S.C. 846.

The Court correctly charged the jury that the conspiracy statute applicable to Count 1 was 18 U.S.C. 371. TheCourt said:

> "Now let us turn to the indictment and then to the statutes involved in the indictment. Count 1 charges conspiracy to violate certain federal laws . . . The conspiracy statute, Section 371, Title 18, of the United States Code, provides, in pertinent part, as follows:
>
> "'If two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such persons does any act to effedt the object of the conspiracy, each shall be guilty of a crime.'" (R. 4120-4121).

The Court further charged that proof of an overt act was required (R. 4135-4138). Count 1 listed nine overt acts and eight more were listed in the bill of particulars. This served to cement the application of 18 U.S.C. 371 rather than 21 U.S.C. 846, as an overt act is required for the former, but not the latter. United States v. Bermudez, 526 F. 2d 89

(2d Cir. 1975); United States v. Gardner, D.C.Cal. 1962, 202 F. Supp. 256; Leyvas v. United States,C.A. Cal. 1967, 371 F. 2d 714.

The Court's charge was a judicial election to construe Count 1, and to submit it to the jury, as being drawn under the general conspiracy statute. The government's silence and failure to object to the 371 charge constituted a prosecutorial election to proceed under Sec.371. There is ample authority for this type of election, especially where an election is necessary to prevent or cure duplicity. Conduct chargeable under a specific statute may also be charged and punished under a general statute. United States v. Haim, D.C.N.Y. 1963, 218 F.Supp. 922. "It is wholly immaterial what statute was in the mind of the District Attorney when he drew the indictment, if the charges made are embraced by some statute in force." Williams v. United States, 168 U.S. 382, 389 (1897). The statute on which an indictment is founded must be determined from facts charged therein, and the facts as pleaded may bring offense charged within one statute, although another statute is referred to in the indictment. United States v. McKenney, D.C.N.Y. 1959, 181 F. Supp. 143, aff'd 281 F. 2d 908, cert. den. 366 U.S. 960, rehear. den. 368 U.S.871.

As will be shown hereinafter the election by the Court and the government to submit the case to the jury as a 371 conspiracy is the only thing that saved Count 1 from being fatally defective for duplicity. Having thus secured a valid conviction under the theory of a 371 conspiracy, the doctrine of judicial estoppel precludes the Court and the government from invoking a different conspiracy statute for sole purpose of imposing a harsher sentence. "Under the doctrine of judicial estoppel a party and his privies who hawe knowingly and deliberately assumed a particular position are estopped from assuming an inconsistent position to the prejudice of the adverse party. This rule ordinarily applies to inconsistent positions assumed in the course of the same judicial proceedings or in subsequent proceedings

involving identical parties and questions." In re Johnson, 518 F. 2d 246,252 (10 Cir. 1975) . See also C.J.S. Estoppel, Sections 117, 118 and 119.

Defense counsel, following the government's closing summation, raised the time span and sentencing problems of Count 1 (R. 4090 et seq). Judge Pollack, without notice then or thereafter to defense counsel, already had made a mental election and decision to charge on Section 371 as the proper way to cure the problem. This is shown quite clearly by Judge Pollack's reply to defense counsel concerning the sentencing problem. "You see, you are presupposing, again, what I will charge as to the law and entrenching on my province. This case has not gone to the jury, and I think the assumptions that underlie your inquiries can only raise spectors that may not at all exist in actuality." (R. 4093). Judge Pollack thereafter laid those "specters" to rest by correctly charging the jury on Sec. 371. This charge cannot lightly be put aside at time of sentencing.

Unless Count 1 is construed as a 371 conspiracy it is fatally defective for duplicity, as attempting to charge, in a single count, two distinct conspiracies. Count 1 recites that "part" of the conspiracy charged therein was in violation of 26 U.S.C. 7237(b), which was the "old" narcotics conspiracy statute, repealed May 1, 1971, and that a "further part" of the conspiracy was in violation of 21 U.S.C. 846, which is the "new" narcotics conspiracy statute, effective May 1, 1971. These two special narcotics conspiracy statutes are mutually exclusive. The old one terminated, time-wise, when the new one commenced. Furthermore, the two statutes have different and mutually exclusive objects in that the object of the old statute was to violate old law substantive offenses proscribed by 26 U.S.C. 4705(a) which was repealed May 1, 1971, while the object of the new conspiracy statute was to violate the new substantive statute, 21 U.S.C. 841, which only became effective May 1, 1971. It is obvious that Sperling could not conspire under

the old conspiracy statute to violate substantive laws not yet in existence, and vice versa. The two statutes are mutually exclusive for the additional reason that they have different penalties.

> "The vice of duplicity is that there is no way in which the jury can convict of one offense and acquit on another offense contained in the same count. A general verdict of guilty will not reveal whether the jury found the defendant guilty of one crime and not guilty of the others, or guilty of all. It is conceivable that this could prejudice defendant in sentencing, in obtaining appellate review, and in protecting himself against double jeopardy." Wright, Federal Practice and Procedure, Criminal, Sec. 142, citing United States v. Shackelford, D.C.N.Y. 1957, 180 F. Supp. 857, 859-860; United States v. Martinez-Gonzales, D.C.Cal. 1950, 89 F. Supp. 62, 64.

Separate conspiracies cannot be charged in one count. United States v. Boyle, D.C.D.C. 1972, 338 F. Supp. 1028,1035; See, also, Kotteakos v. United States, 328 U.S. 756 (1946).

Prejudice to Sperling may be avoided only by sentencing under the least severe conspiracy statute that is applicable, to-wit, Sec. 371.

In United States v. Shackelford, supra, D.C.N.Y. 1957, 180 F. Supp. 857 (1957), the court held that where an indictment charged a defendant with conspiring to violate a special narcotics conspiracy statute as well as the general conspiracy statute, and the conspiratorial crimes involved different punishments, the duplicity was more than technical, and the defendant must be sentenced under the least severe of the two statutes. The Court further held that the defendant's failure to object to the indictment on this ground prior to trial was not a waiver of the right to object after verdict to duplicitous indictment.

In Smith v. District of Columbia, D.C. Cir. 1967, 387 F. 2d 233, an information was drawn under two statutes, both of which prohibited the criminal conduct in question, however the defendants did not know with certainty which statute the government was proceeding under. The Court ofAppeals reversed the judgment of conviction, holding that the appellants were

entitled to know the possible penalty threatened. 387 F. 2d at p. 237.

In Brown et al v. United States, 299 F. 2d 438 (D.C.Cir. 1962), cert. den. sub nom. Thornton v. United States, 370 U.S. 946, the Court was confronted with a sentencing problem in a narcotics conspiracy case. Four conspiracy statutes were involved, including Sec. 371, and all had different penalties. The jury did not return a special verdict, and its general verdict did not say whether the defendants conspired to violate one of more of the three severe-penalty conspiracy statutes, or the less severe Sec. 371. The Court of Appeals in an opinion by then Circuit Judge Burger, now Chief Justice, gave the government the option of letting the defendants be resentenced under Sec. 371 to not more than five years imprisonment, or award them a new trial, citing Shackelford, supra.

In United States v. Amato et al, S.D.N.Y. 1973, 367 F. Supp. 547, one count of the indictment alleged a conspiracy under both the general conspiracy statute and another conspiracy statute proscribing certain conduct incident to racketeering. The Court held that if the conspiracy count was submitted to the jury under those conditions, "the court will be required to impose a sentence under the statute providing the least severe punishment," citing Brown, supra. Amato is particularly applicable to the instant case, as it speaks of the theory under which the case was "submitted to the jury," which theory, in the instant case, was Sec. 371, specifically. (R. 4120-4121).

The ambiguity in the above-cited cases arose from conspiracy statutes involving different penalties being cited in the indictment itself. The ambiguity in the instant case arises from the charge to the jury on Sec. 371 and the fact that the conspiracy actually proved violated both Sec. 371 and 21 U.S.C. 846, as well as 26 U.S.C. 7237(b). It is true that 18 U.S.C. 371 was not cited in the indictment itself, however this is not significant in view of the Court's charge and the rule stated ante, page

32, that it is "wholly immaterial" what statute was in the district attorney's mind when he drew the indictment, and that the substance of a pleading and not its nomenclature is controlling. Here, Count 1 was specifically and purposely "submitted to the jury" as being drawn under Sec. 371, which is more controlling, and of greater significance, than the mere citation of 21 U.S.C. 846 tacked onto the end of Count 1 by the district attorney.

The Government's Spurious "Concession"

The government may attempt to argue that the Court's charge on Sec. 371 is not binding for sentencing purposes, and that the apparent or potential duplicity in Count 1 was cured by the government's "concession" that there was no proof of pre-May 1, 1971 conspiracy. The record shows that just before the Court charged the jury, government counsel belatedly and without prior notice or discussion filed the following unilateral "concession" as Court's Exhibit 145:

> "The Govt. concedes, for the purposes of charge of the Court, and sentencing, in this trial, that the proof with respect to the defendants now on trial and charged in Count 1, shows no act by any such defendant prior to May 1, 1971. Accordingly, no 'old' law charge need be given, and sentencing under the new law will be appropriate." (Court's Exhibit 145, filed at 1:30 pm. 7/11/73; R. 4099).

The foregoing concession was communicated to the jury when the Court charged:

> "The government concedes that no act by any defendant on trial was earlier than May 1, 1971, and for purposes of your consideration of the evidence that may be considered as the earliest day of the existence of the conspiracy that is alleged." (R. 4123).

The government's so-called concession was wholly spurious in that it purported to concede the non-existence of pre-May 1, 1971 conspiracy proof, although such proof had been elicited to the jury in overwhelming prejudicial abundance and was never stricken. The government purposely had elicited such proof at the trial, much of it over defense objection, had relied

on such proof in argument to the jury, and even continued to cite such proof on the original direct appeal. The government's proof of pre-May 1, 1971 conspiratorial associations, meetings, conversations and conduct included, inter alia, the testimony of government witnesses Lipsky (R. 881-886), Finkelstein (R. 2724-2728, 2778, 2782-2783), Lore (R. 3133, 3150-3151), Juan Serrano (R. 3324-3326, 3339, 3358) and Susan Weyl (R. 1422-1445). Government counsel (Mr. Velie) in closing argument to the jury did not suggest or concede that the government's proof did not apply to the entire time span of Count 1, or that such evidence should be stricken and ignored, but merely told the jury that the Count 1 conspiracy was "described in the government's proof" (R. 4080). Mr. Velie specifically commented on Sperling's 1971 tax return (R. 4057). Mr. Velie designedly waited until the final arguments were concluded, including his own, to file his short and cleverly worded "concession" which the jury did not see. The jury was advised of the concession in one brief sentence that was buried in the Court's lengthy charge (R. 4123). The jury was never instructed to disregard the pre-May 1, 1971 proof, and this proof was never categorically stricken from the record.

The pre-May 1, 1971 proof introduced to the jury is summarized in the separate appendix to this brief, pp. App. 57-61. Even on the original direct appeal to this Court the government continued to cite and rely on the pre-May 1, 1971 proof. See government's brief, Case No. 73-2363, pp. 7, 8, 15, 20, 45, 50 (footnote), 51, 89, 96, 97. The manner in which the government utilized and relied on this proof is shown in the appendix hereto, pp. App. 57-61.

Testimony that is ambiguous as to precise dates is found throughout the record. Government witnesses testified as to conspiratorial conduct that occurred "in 1971", or in the "Spring of 1971", without saying whether the event was pre- or post-May 1, 1971. See Lipsky's testimony at R. 909,

958, 1097; Berger at R. 3090, and Sperling's cross-examination about his association with the "Frenchman" without giving dates (R. 2937-2939). The record is replete with other testimony that is ambiguous as to dates. Defense counsel, not being privy to the game plan of government counsel to withdraw pre-May 1st proof from the jury at the eleventh hour, did not insist on precise dates, thus leaving the jury free to speculate as to whether the evidence was pre- or post-May 1st.

The government's so-called concession, being both spurious and untimely, did not gain validity merely by the Court's communicating it to the jury. The Court's one-sentence charge on the concession (R. 4099) did not erase from the jury's mind the pre-May 1st proof. Other parts of the Court's charge attenuated and contradicted the one brief reference to the so-called concession. For instance, the Court charged that the government was "not required to prove that the conspiracy began on a specific day or ended on a specific day" (R. 4123), and that all the conspirators need not have participated in the conspiracy at its inception, but that in order to be guilty, one who "comes in later" may become a member of the conspiracy and is legally responsible for all acts by other members "before and afterwards." (R. 4132). This is no doubt a correct general instruction of the conspiracy law, but under the peculiar circumstances of the instant case, where the Count 1 conspiracy, as initially charged by the grand jury, straddled the time curtain date of May 1, 1971, more than one sentence in the Court's charge was required to effectively withdraw from the jury's mind the voluminous pre-May 1st evidence.

The Court not only failed to categorically charge the jury to disregard the pre-May 1st proof but pointedly called their attention to such evidence relating to huge narcotics transactions occurring over a "period of three years", which necessarily would have gone back in time prior to May 1, 1971 (R. 4167).

There is authority for the proposition that where a count of an indictment charges two separate offenses, the government may elect upon which charge it will rely, and the defendant is not harmed if the proof is limited to only one of the charges in the duplicitous count. This rule does not apply in the instant case, as there was abundant proof of the pre-May 1st conspiracy, the jury heard such proof, and such proof was not effectively withdrawn by the Court from their consideration in categorical terms.

Amendment of Indictment

If this Court nevertheless holds that allegations and proof of the pre-May 1st conspiracy were effectively withdrawn by the Court's instructions and by amendment of the indictment, then, and in that event, all of Count 1 was fatally infected by such impermissible amendment. Judge Pollack, in addition to orally instructing the jury that May 1, 1971 "may be considered as the earliest day of the existence of the conspiracy" (R. 4123) also physically amended the fact of the indictment. Immediately after the jury retired to deliberate, the Court said to government counsel:

> "THE COURT: Now if the indictment is sent for, what I would like to do is line out or Xerox out any reference to the so-called old law which I excluded by the charge. Can you arrange to Xerox that page with a cover on that and . . . if it is called for, we will have it ready ? this is not the original but it is good for Xeroxing purposes . . . Put an S with a slash and write the name Seymour above the line . . ." (R. 4238-4239).

Government counsel at the Court's direction thereupon performed major surgery on the indictment, excising approximately one-half of the charging part of Count 1 which was considered by the Court to be malignant, and changing the beginning date of the conspiracy from January 1, 1971 to May 1, 1971. The date change and deletions are indicated by red type and red line in the following reproduction of Count 1:

Count one

From on or about the 1st day of ~~January~~ May, 1971 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, HERBERT SPERLING, BEN MALLAH . . . and others to the Grand Jury known and unknown, unlawfully, wilfully, intentionally and knowingly combined, conspired, confederatedand agreed together and with each other to violate ~~Sections 4705(a) and 7237(b) of Title 26, United States Code;~~ and 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

~~2.--It was part of said conspiracy that the said defendants and co-conspirators unlawfully, wilfully, intentionally and knowingly would sell, barter, exchange and give away narcotic drugs, the exact amount and nature thereof being to the Grand Jury unknown, not in pursuance of a written order of the person or persons to whom such narcotic drugs were sold, bartered, exchanged and given away on a form issued in blank for that purpose by the Secretary of the Treasury or his delegate, contrary to law, in violation of Sections 4705(a) and 7237(b), Title 26, United States Code.~~

3. It was further part of said conspiracy that the said defendants and co-conspirators unlawfully, wilfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown, in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

(Nine overt acts omitted).

(Title 21, United States Code, Section 846).

It is obvious that the changed and deleted portions of Count 1 related to matters of substance, hence did not come within any of the exceptions which permit corrections of typographical errors, misnomer,

aliases, irrelevant surplusage, and other matters of form.

The rule that the Court may, in certain instances, "narrow" a count of an indictment by withdrawing part of it from the jury's consideration applies only in cases where no evidence of the withdrawn portion was presented to the jury or, if offered, was ordered stricken, and the jury ordered to disregard it, and no prejudice is shown against the defendant. Furthermore, such "narrowing" of the charge may be effected, if at all, only by the Court's oral instruction, and may not be done by physically amending the face of the indictment. Ex parte Bain, 121 U.S. 1 (1887). Federal courts are without power to alter or amend indictments found by a grand jury. United States v. Krepper, 159 F. 2d 958 (3d Cir. 1946), cert. den. 330 U.S. 824. Since an indictment is returned under oath by the grand jury, it can only be superseded by an indictment of equal solemnity. Bigrow v. Hiatt, D.C.Pa. 1947, 70 F. Supp. 836, adhered to D.C.Pa. 1947, 84 F. Supp. 240, aff'd 168 F. 2d 992 (3d Cir. 1948). An amendment is not proper if matter is "neither trivial, useless, nor innocuous." Stirone v. United States, 361 U.S. 212, 4 L. Ed. 2d 252 (1960); see, also, Marsh v. United States, 344 F. 2d 317, 320-322 (5th Cir. 1965).

Absent the pre-May 1, 1971 allegations in the charging part of Count 1 the grand jury might not have found a true bill. In Ex parte Bain, supra, the Court reasoned that trial on an amended indictment is constitutionally repugnant because there is no way of knowing whether the grand jury would have returned the indictment, as amended, if they had been given the opportunity.

Amendment of indictment occurs when charging terms of indictment are altered either literally or in effect by prosecutor or the Court after the grand jury has last passed upon them. Gaither v. United States, 413 F. 2d 1061 (D.C. Cir. 1969); United States v. Robinson, 475 F. 2d 376, 385 (D.C. Cir. 1973); United States v. Griffin, 463 F. 2d 177, 178 (10th Cir. 1972).

If an amendment of indictment goes to an essential element of the crime, it is a substantial change and cannot be made except by resubmission to the grand jury. United States v. Fischette, 450 F. 2d 34 (5th Cir. 1971) cert.den. 405 U.S. 1016.

"Non-essential detail in an otherwise good indictment does not invalidate it, but, where grand jury indicts under one statute, conviction may not be had under another by device of discarding essential averments as surplusage." Bratton v. United States, 73 F. 2d 795 (C.C.A. Okla. 1934). To same effect: United States v. Smith, 232 F.2d 570 (3rd Cir. 1956), and United States v. Goodwin, 20 F. 237.

It is immaterial whether the trial jury saw the physically amended indictment, as the Court may not materially change an indictment by its instruction to the jury. United States v. Alaimo, 297 F.2d 604 (3rd Cir. 1961) cert. den. 369 U.S.817.

In Edgerton v. United States, 143 F. 2d 697 (9th Cir. 1944), the change in question was not one of mere form, or the ignoring of an innocuous averment, but rather one affecting substance. The Court held that such changes cannot be made by an instruction of the judge to the jury any more than they can be made by the actual physical alteration of the indictment. So construed, Edgerton standsfor the same principles as enunciated by the Supreme Court in Stirone v. United States, supra, 361 U.S. 212, 214, and Russell v. United States, 369 U.S. 749 (1962), namely, that the court may not by any means (e.g., physical alteration, jury instruction, or bill of particulars) alter the material and essential nature of an indictment. Edgerton prohibits thealteration of an INDICTMENT by instruction wherethe alteration affects the substantial rights of the defendant.

In Carney v. United States, 163 F. 2d 784 (9th Cir.) cert. den. 332 U.S. 824 (1947) the court held that actual and physical striking out of words on the face of an indictment was impermissible.

Sperling did not waive his right to be tried and sentenced on an indictment as returned by the grand jury. He did not consent to the amendment, which was a bilateral project of the Court and the prosecutor. He had no prior notice that the government was going to make a last minute so-called concession which would lead to amendment of the indictment. Following the Court's charge on the government's concession, Sperling's counsel made a timely objection, stating: "I think that the government failed to prove the allegations of the conspiracy count and has admitted in essence that the conspiracy is not the one that theycharged and that it only came into existence on May 1st, not January 1st, thereby being an amendment to the indictment." (R. 4195). Absence of waiver is further shown by Sperling's motion for new trial (paragraph 3 of motion) and motion to arrest judgment, based on ground that Count 1 was defective.

Judge Pollack stated in the instant proceeding that Sperling's attorney "specifically assented to the sentencing of the defendant pursuant to Sec. 846 when sentence was imposed on Count I." (App. 120). It is true that Sperling's counsel inquired as towhether the Court was proceeding under Sec. 846,but this inquiry did not amount to an "assent". At any rate, neither Sperling's counsel nor Sperling himself could confer jurisdiction on the Court tosentence to a harsher sentence under the wrong statute. Either the Court had jurisdiction, or it did not have jurisdiction,to sentence under Sec. 846, and nothing Sperling's counsel did or failed to docould change that fact.

As noted previously there is authority for the proposition that where a count of the indictment charges two separate offenses, the government may elect upon which charge it will rely, Franklin v. United States,

330 F. 2d 205, 207 (D.C.Cir. 1964), and the defendant is not harmed if the proof is limited to only one of the charges in the duplicitous count, United States v. Gibson, 310 F. 2d 79, 80-81 (2d Cir. 1962). However this rule is not applicable to the instant case because Count 1 as returned by the grand jury is not duplicitous if properly construed, as the Court did in submitting it to the jury as a 371 conspiracy; furthermore, the proof adduced to the jurywas not limited to the post-May 1, 1971 conspiracy, as shown ante, pages 35A-37, and in the appendix, pp. App. 57-61.

There is no rule and no precedent for amending a perfectly good and valid indictment after the evidence is in, the closing arguments are made, and the jury has gone out to deliberate, for the sole purpose of enabling the Court to impose a harsher sentence than would be possible without the amendment. The government properly proved a single conspiracy under Sec. 371 which was in effect during theentire time span of Count 1 as the grand jury returned it. It was proper to prove both pre-and post-May 1st conspiratorial conduct under Sec. 371, as a single conspiracy may have multiple objects, assuming the conspiracy statute is in existence throughout the overall conspiracy. Count1 was duplicitous only if improperly construed as drawn under the twospecial narcotics statutes, neither of which covered the entire time span of Count 1 as originally drawn. If Count 1 was treated as a Sec. 371 conspiracy this problemdid not exist, and there was no duplicity, hence no need for amendment.

Prejudice to Sperling

As already stated, amendment of the indictment enabled the Court to treat Count 1, for sentencing purposes, as a Sec. 846 conspiracy permitting a sentence of 30 years imprisonment and $50,000.00 fine, which the Court imposed; whereas, if the indictment had not been amended, the Court would have been obliged to impose sentence under penalty provision

of Sec.371, with maximum of five years imprisonment and $10,000.00 fine.

Sperling was also prejudiced and denied due process by the timing of the government's so-called concession, which led to amendment of the indictment, and resulted in trial by trickery. In retrospect it is crystal clear that the government knowingly and deliberately put the pre-May 1st conspiracy allegations in Count 1 for tactical advantage for purpose of getting pre-May 1st proof before the jury, intending all along to get as much benefit as possible from the pre-May 1st proof, then to "concede" with tongue in cheek at the last minute that there was no pre-May 1st conspiracy, after all. The problem of the May 1, 1971 time curtain which separated the old and new narcotics conspiracy statutes was called to the government's attention in a pre-trial motion filed by Sperling's counsel to dismiss the indictment and/or to sever Count 1. (R. 2,7, 10-11, 13). Nevertheless the government, after the motion was filed and partially argued, obtained a superseding indictment, on which Sperling was tried, without correcting the time span problem of Count 1. Government counsel's closing argument to the jury shows that he was well aware of the Count 1 time span problem, and intended all along not to let the jury see Count 1 of the indictment, at least not in its unexpurgated form. Mr. Velie was perfectly willing for the jury to see the substantive counts of the indictment but not Count 1. This is shown by his closing argument, and prior to his so-called concession and amendment of the indictment, when he told the jury:

> ". . . I understand that a copy of the indictment will be sent in to you so you can actually read what is charged in the substantive counts. . . If you wishto have the substantive counts to consider the indictment is available to you and you may ask for it. The first count charges conspiracy alleged here and described in the government's proof."
> (R. 4079-4080).

Obviously, Mr. Velie had something in mind about Count 1 and about amending the indictment that was not yet known to defense counsel.

Evenafter Mr. Velie finished his argument and defense counsel pointedly asked what the government contended respecting the May 1st time curtain and related sentencing problem, Mr. Velie still pretended he did not know what position the government would take, and gave no warning of the so-called concession he planned to surprise defense counsel with and catch them off guard about 30 seconds before the Court commenced its charge to the jury (R. 4090 et seq). It appears that Judge Pollack must have had some kind of bilateral agreement or understanding with government counsel and the "game plan," as Judge Pollack pretermitted the discussion of the sentencing problem with an admonishment to defense counsel, as mentioned previously in this brief, stating: "You see, you are presupposing, again, what I will charge as to the law and entrenching on my province. This case has not gone to the jury, and I think that the assumptions that underlie your inquiries can only raise specters that may not at all exist in actuality." (R. 4093). "We will go to lunch now. (R. 4094).

Right after lunch and immediately before the Court charged the jury government counsel filed the so-called concession, taking all defense counsel by surprise and depriving them of an opportunity to re-think the defense strategy. The Court's Sec. 371 charge likewise was a complete surprise to all defense counsel. Had they known prior to oral argument of the anticipated so-called concession and the anticipated Sec. 371 charge, they could have tailored their argument to the jury, and their requests for instruction to the jury, accordingly. They could have demanded a stipulation that sentence would be pursuant to Sec.371, had they known of the anticipated charge which was to be based on the "concession."

They could have argued tothe jurythe Government's admitted failure to prove what it had alleged in Count 1. They could have moved to strike all the evidence of the pre-May 1st part of the conspiracy. They could have moved for a mistrial because of the admission of such evidence on the ground that it could not be erasedfrom the jury's mind by simple instruction or by the ambiguous instruction that was actually given .

The late, untimely, and prejudicial amendment of the indictment and withdrawal of old law allegations and proof from the case (or attempted withdrawal) enabled the Court to use the old law allegations in Count 1 as basis for denying Sperling's attorney's pre-trial motion to dismiss Count 1. Mr. LaPorte on May 25, 1973, had moved to dismiss Count 1 on the ground that "a group conspiracy as charged in Count One is a logical and necessary prerequisite to commission of the substantive offense charged in Count Two." The Court denied the motion primarily on the ground that the time spans of Countl and 2 were not "coterminous." If the government had made its "concession" at that time, the Court would have had less basis fordenying the pretrial motion to dismiss Count 1. This is another example of how Sperling was prejudicedby the Government's timing of its so-called concession,the resultant charge of the Court, and later physical amendment of the indictment.

By delaying its concession until all the evidence was in, both pre- and post-May 1st, the government cleverly prevented defense counsel from interposing timely objections to testimony of pre-Maylst conspiratorial conduct, especially hearsay declarations occurring prior to May 1, 1971, as defense counsel was lulled and deceived into believing that Count 1 would be submitted to the jury as charging both a pre- and post-May 1st conspiracy. For the same reason defense counseldid not demand specificity from numerous government witnesses as todates, believing that since the

conspiracy charged in Count 1 straddled the May 1st dividing line, it was immaterial whether events and hearsay declarations testified to by Government witnesses as occurring "in 1971" or in the "Spring of 1971" were pinpointed as pre- or post- May 1st. The rule is well established that hearsay declarations of a co-conspiratorto be admissible against another co-conspirator must occur "during the existence of the conspiracy." Wharton's Criminal Evidence, Vol. 2,Sec. 428, page 198 (12th Ed. 1955); see,also, Brown v. United States, 150 U.S. 93. Taking the government's concession and the amendment tothe indictment at face value, the Count 1 conspiracy was not in "existence" prior to May 1, 1971, as the underlying statutes had not been enacted yet, hence all pre-Mayl hearsay declarations were clearly inadmissible and would have been timely objected to and excluded or stricken immediately if government counsel had not designedly waited until half a minute before the Court charged the jury to fob off the spurious "concession."

Moreover, the testimony of Sperling, other defendants, and defense witnesses might well have beendifferent had they known of th government's planned concession. In United Satates v. Russano. 257 F. 2d 712 (2nd Cir. 1958) the indictment charged a continuing conspiracyfrom 1951 to 1957 but there the proof disclosed two conspiracies in those years which the indictment had lumped together. It was held that this prejudiced the defendant by allowing admission of evidence not otherwise admissible.

The government's cleverly worded concession appears on first blush to say there is no proof whatsoever of pre-May 1, 1971 conspiracy,but on closer examination is shown to say only that the pre-May 1stproof shows no "act" by any defendant "now on trial." This crafty wording does not exclude the conspiratorial acts of Lipsky and Finkelstein who were unindicted co-conspirators not "on trial," or of Pacelli whowas severed. None of these three were "defendants now on trial." The government's

so-called concession was
/ spurious, misleading, and actually a "non" concession.

In sum the nuances and subtelties of the Count 1 metamorphosis involved a pre-Maylst conspiracy that conveniently disappeared at just the right time for the government; a concession that was not a concession; the Court's charge on the so-called concession appearing to eliminate pre-May 1st proof, immediately followed by a lengthy marshalling of pre-May 1st evidence (R.4167) and failure to strike such evidence from the record; capped off by an amendment that was not an amendment, as the physical alteration was done to a copy of the indictment rather than the original. These sophisticated shenanigans were obviously designed so as to leave open an avenue of retreat for the government if and when an attack should be made on any particular phase of the prestidigitation performed on Count 1.

The only wayto cure the prejudice suffered by Sperling on account of the government's spurious concession leading tothe physical amendment of the indictment is to vacate the sentence on Count 1, or alternatively, to resentence Sperling to penalty provisions of Sec. 371, with maximum penalty of five years imprisonment plus a $10,000.00 fine.

The principal contention of Sperling under Point 3 of this brief is that he should have been sentenced pursuant to Sec.371 instead of Sec. 846. The issues of duplicity, trial by trickery, improper admission of hearsay evidence, are not relied on <u>per se</u> for reversal or a new trial or reduction of sentence, but are relied on as subsidiary and underlying issues in support of Sperling's principal due process of law contention, that he was sentenced under the wrong statute, was not properly and timely informed ofthe nature of the charge against him, and was not given proper notice as to the intention of the government and the Court respecting the so-called concession leading to physical amendment of the indictment.

CONCLUSION

For the foregoing reasons, the sentence on Count 1 should be vacated. Alternatively, Sperling should be resentenced pursuant to 18 U.S.C. 371 to not more than five years imprisonment and a $10,000.00 fine.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify this 5th day of August 1976 that I have mailed a copy of the foregoing brief, and a copy of the Appendix to Appellant's Brief, Pages App.1-124, inclusive, to counsel for the government, first class postage prepaid, addressed as follows: Mr. James P. Lavin, Assistant United States Attorney, 1 St. Andrews Plaza, New York, N.Y., 10007. Original and five copies being mailed this date of brief and appendix to Clerk of United States Court of Appeals for the Second Circuit.

Herbert Sperling

HERBERT SPERLING
Appellant pro se

Subscribed and sworn to before me,
and accepted by me for mailing as
stated in the foregoing certificate
of service, by Herbert Sperling,
Reg. No. 78271, this 5th day of
August, 1976.

R Blue

(Authorized by the Act of July 7, 1955,
to Administer Oaths 18 U.S.C. 4004).

Parole Officer: Authorized by the Act of July 7, 1955 to Administer Oaths (18 U.S.C. 4004).